Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

CORAMAE ELLA GARY,

Petitioner,

vs.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY and JAMES EDWARD LONG,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

STEVEN G. READE
Counsel of Record
CHARLES W. SCARBOROUGH
KATHLEEN A. BEHAN
ARNOLD & PORTER
Attorneys for Petitioner
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

7604
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QUESTIONS PRESENTED

I. Where supervisors use authority delegated from their employers to sexually harass employees under their control, does Title VII require the victims of such harassment to "resist" their harassers and suffer actual adverse employment action before they may proceed under a *quid pro quo* theory of sexual harassment resulting in strict employer liability?

II. Where supervisors use authority delegated from their employers to sexually harass employees under their control, does the existence of reasonable employer policies prohibiting sexual harassment insulate employers from Title VII liability as a matter of law under generally accepted agency principles?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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October Term, 1995

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Petitioner,

vs.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY and JAMES EDWARD LONG,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Coramae Ella Gary, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 59 F.3d

1391 and is reproduced in the Appendix filed herewith ("App.") at 1a. The unreported opinions of the district court in this case are reproduced at 19a, 21a, and 35a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on July 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII") is set forth below:

> § 2000e-2. Unlawful employment practices
>
> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment

> opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Cora Gary was sexually harassed for a period of almost two years, and raped on one occasion, by her superintendent at the Washington Metropolitan Area Transit Authority ("WMATA"), Respondent James Edward Long. Mr. Long was one of several individuals who hired Ms. Gary to begin work at WMATA as a stock clerk in 1987. He had second-level supervisory authority over Ms. Gary at all relevant times, including power to discipline her and at least apparent authority to fire her.

Beginning in 1988, Mr. Long began telling Ms. Gary that he would like to have a sexual relationship with her. He regularly made crude remarks about her appearance and told her that he could make it easy for her on the job if she would agree to have sex with him and to "be his girl." Ms. Gary uniformly rejected his advances, making it clear to him that they were unwelcome and threatening to her. As a result, as the Court of Appeals noted, Mr. Long changed his approach: "After this carrot proved unsuccessful, Long tried using a stick." 59 F.3d at 1393 (App. A, 3a).

Faced with rejection, Mr. Long began threatening to fire Ms. Gary or take other adverse job-related actions against her and her husband, who also worked for WMATA, if she continued to refuse to have sex with him. Further, he threatened adverse employment consequences if she reported his harassment to anyone, telling her repeatedly that no one would believe her and that it would only make things worse for her. Ms. Gary believed Mr. Long's threats. She hoped that Mr. Long would eventually

leave her alone if she continued to refuse his sexual advances, but she did not report his harassment because she was too afraid that Mr. Long would carry out his threats.

On one occasion, in May or June of 1989, Mr. Long ordered Ms. Gary to accompany him to a new WMATA facility that was then under construction, ostensibly to inspect the site where he and Ms. Gary would soon be working. On the way to the new warehouse, during normal working hours and in a company truck, Mr. Long sexually assaulted Ms. Gary, repeatedly fondling her and telling her to "shut up" despite her pleas for him to leave her alone. Once there, he raped her.

On the way back to work from the warehouse, Mr. Long again threatened Ms. Gary, telling her that he would have her fired if she told anyone what had happened and warning her that no one would believe her anyway. Once again, Ms. Gary believed his threats. She was so afraid that she did not tell anyone about the rape or any of the harassment, not even her husband. She continued to hope that Mr. Long would eventually stop harassing her if she just kept rejecting him.

But the harassment did not stop, and eventually Ms. Gary could tolerate it no longer. In February 1990, she filed an internal grievance complaining about Mr. Long's harassment. After a WMATA investigation concluded that there was insufficient evidence to support her claim, Ms. Gary filed a charge of sexual harassment with the Equal Opportunity Employment Commission ("EEOC") on May 16, 1990. The EEOC issued a "right to sue" letter on September 28, 1990, and on December 19, 1990, Ms. Gary filed a complaint against Mr. Long and WMATA in the United States District Court for the District of Columbia alleging sexual harassment in violation of Title VII and a number of supplemental state law tort claims. Subject matter jurisdiction over these claims was proper under 28 U.S.C. § 1331 and 28 U.S.C. § 1367.

On December 2, 1992, District Judge Stanley Sporkin dismissed Ms. Gary's Title VII claim against WMATA on the grounds that WMATA neither knew nor had reason to know of the harassment until Ms. Gary reported it and that WMATA took sufficient steps to investigate and remedy the situation once it became aware of the allegations (App. D, 35a). Judge Sporkin also declined to exercise jurisdiction over Ms. Gary's state law tort claims and referred her remaining Title VII claim against Mr. Long to a magistrate judge. On November 9, 1993, Magistrate Judge Alan Kay granted Mr. Long's motion for partial summary judgment on the ground that individual supervisors cannot, as a matter of law, be held liable for monetary damages in their personal capacity under Title VII (App. C, 21a). As no remedy remained available under Title VII at this point, Judge Kay dismissed this case on January 4, 1994 (App. B, 19a).

On appeal, the United States Court of Appeals for the District of Columbia Circuit held that the district court improperly declined to exercise jurisdiction over Ms. Gary's state law claims, but affirmed the dismissal of Ms. Gary's Title VII claims against both Mr. Long and WMATA. The court held that an individual supervisor such as Mr. Long cannot be liable for monetary damages in his personal capacity under Title VII. 59 F.3d at 1399 (App. A, 15a). The court further held that WMATA was not liable for Mr. Long's acts of sexual harassment under either a *quid pro quo* theory or a hostile work environment theory, reasoning that Ms. Gary had "failed to make out a claim of quid pro quo sexual harassment" because "it takes more than saber rattling alone to impose quid pro quo liability on an employer," 59 F.3d at 1396 (App. A, 8a), and declaring that an employer "must be absolved of Title VII liability under a hostile work environment theory of sexual harassment" where the employer has promulgated a reasonable anti-sexual harassment policy and taken prompt remedial actions once it became aware of any incidents of harassment. 59 F.3d at 1398 (App. A , 13a).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to resolve a split between the federal circuit courts of appeals on two important questions concerning employer liability for sexual harassment by supervisors against employees under their control. In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), this Court "decline[d] the parties' invitation to issue a definitive rule on employer liability" for workplace sexual harassment, instead directing the lower courts "to look to agency principles or guidance in this area." 477 U.S. at 72. Nearly ten years later, this experiment with malleable "agency principles" as the sole guidepost for determining employer liability for sexual harassment under Title VII has left the law in a state of disarray and created a serious and growing conflict among the federal circuit courts of appeals.

Without a "definitive rule," or at least more specific guidance, the lower courts have used a hodgepodge of conflicting agency principles and theories to reach *ad hoc* and often contradictory conclusions as to whether employers should be held liable for acts of sexual harassment committed by supervisory personnel. *See, e.g., Karibian v. Columbia University*, 14 F.3d 773 (2d Cir. 1994), *cert. denied*, 114 S. Ct. 2693 (1994) (employer liable for supervisor's acts despite employer anti-harassment policy); *Bouton v. BMW of North America*, 29 F.3d 103, 100 (3d Cir. 1994) (employer not liable; but decision "to alleviate liability" based on employer's anti-sexual harassment policy "is a policy decision based on the appropriate amount of deterrence"); *Sparks v. Pilot Freight Carriers*, 830 F.2d 1554, 1560 (11th Cir. 1987) (employer liable where supervisor was "aided by" employer authority in harassing); *Baskerville v. Culligan International Co.*, 50 F.3d 428, 431-32 (7th Cir. 1995) (employer not liable; but noting that it is an open question whether an employer is strictly liable "where

a supervisor threatens to fire a subordinate if she refuses to have sex with him"); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1351-53 (4th Cir. 1995) (employer liable because harasser's acts were within the scope of employment and harasser was aided by apparent authority from employer, despite existence of employer anti-harassment policy); *Nichols v. Frank*, 42 F.3d 503 (9th Cir. 1994) (employer liable where supervisor used employer's authority to make *quid pro quo* threats to employee); *Hirschfeld v. New Mexico Dept. of Corrections*, 916 F.2d 572, 579 (10th Cir. 1990) (employer not liable where harasser "never invoked [employer's] authority to facilitate his harassment of plaintiff").[1]

The decision by the United States Court of Appeals for the District of Columbia Circuit in this case demonstrates the danger that continued uncertainty on the scope of employer liability will eviscerate Title VII's protection against sexual harassment. The D.C. Circuit has strayed from this Court's holding in *Vinson* and precedent in other federal circuit courts of appeals to issue a ruling in this case that insulates employers from Title VII liability for workplace sexual harassment in a broad range of cases. In essence, the court has created a "safe harbor" for employers — exempting them from liability as a matter of law — so long as they have no actual or constructive knowledge of sexual harassment, have implemented a reasonable anti-sexual harassment policy, and the harassing supervisor has taken no tangible adverse employment action against the victim, regardless of the harasser's use of employer-delegated authority

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1. By providing an expanded range of remedies for victims of sexual harassment and other forms of discrimination, including compensatory and punitive damages, the Civil Rights Act of 1991 has raised the stakes and heightened the need for uniform standards in this area.

to further his harassment or to make plausible his *quid pro quo* threats of job-related reprisals.[2]

This result is unsupported by any agency law principle and is thus contrary to *Vinson* and numerous decisions by other federal circuit courts of appeals. It precludes victims of sexual harassment in the D.C. Circuit from pursuing claims available to similarly situated victims in other circuits,[3] and it violates the maxim that Title VII should be liberally interpreted to provide relief to all victims of workplace discrimination. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-19 (1975). This result cannot stand.

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2. The bounds of the court's "safe harbor" provision are potentially enormous. Its requirements will be satisfied in numerous cases because many employers now have anti-sexual harassment policies; employers frequently have no knowledge of sexual harassment, as it usually occurs behind closed doors; and there is no need to take adverse employment action when *quid pro quo* harassment has been effective, because the victim submits to the harasser's demands or at least tolerates them.

3. In light of now near-unanimous holdings by the circuit courts of appeals that individual supervisors are not liable for damages for sexual harassment in their personal capacity under Title VII, including the D.C. Circuit in this case, 59 F.3d at 1399 (App. A, 15a); *see also Miller v. Maxwell International, Inc.*, 991 F.2d 583 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1049 (1994), victims of sexual harassment will have no remedy unless their employers can be held liable when their supervisors use employer-delegated authority to sexually harass them.

I.

WHERE SUPERVISORS USE AUTHORITY DELEGATED FROM THEIR EMPLOYERS TO SEXUALLY HARASS EMPLOYEES UNDER THEIR CONTROL, TITLE VII DOES NOT REQUIRE EMPLOYEES TO "RESIST" THEIR HARASSERS AND SUFFER ACTUAL ADVERSE EMPLOYMENT ACTION BEFORE MAINTAINING A *QUID PRO QUO* THEORY OF SEXUAL HARASSMENT.

The D.C. Circuit's opinion in this case unduly limits the reach of the *quid pro quo* theory of sexual harassment. By holding — in conflict with at least two other circuits — that a harassing supervisor's threats must actually be carried out before a cause of action for *quid pro quo* harassment exists, the D.C. Circuit ignored the fact that threats made by supervisory personnel with apparent authority to carry them out materially and adversely alter the "terms, conditions, or privilege of employment," as broadly defined in Title VII. *See Harris v. Forklift Systems, Inc.*, __ U.S. __, 114 S. Ct. 367, 370 (1993) (Title VII's language regarding terms and condition of employment must be broadly construed). Threats have this effect whether or not they are ultimately carried out. To the extent such threats are made possible and plausible because employers have delegated power and authority to supervisors, it is both reasonable and fair to hold the employers accountable for abuse or threatened abuse of that authority.

The D.C. Circuit's holding that "it takes more than saber rattling alone to impose quid pro quo liability on an employer," 59 F.3d at 1396 (App. A, 8a), conflicts directly with decisions by the Second and Ninth Circuits. *See, e.g., Karibian v. Columbia University*, 14 F.3d 773, 775 (2d Cir. 1994) (district court erred by requiring plaintiff "to demonstrate actual economic loss to prove

quid pro quo sexual harassment"), *cert. denied,* 114 S. Ct. 2693 (1994); *Nichols v. Frank,* 42 F.3d 503, 511 (9th Cir. 1994) ("quid pro quo harassment occurs whenever an individual explicitly conditions a job, a job benefit, or the absence of job detriment, upon an employee's acceptance of sexual conduct"). As these courts have held, and others have implied, it is the *conditioning* of terms and conditions of employment upon an employee's response to sexual overtures that establishes *quid pro quo* harassment. How the victim reacts — and thus whether the harasser ever has to carry out his threats — should be and is immaterial.

As the Second Circuit recognized in *Karibian,* it makes no sense to distinguish between victims of sexual harassment who *resist* a superior's advances, and can thus "expect to suffer some job-related reprisal," and those who *submit* to such advances: "The supervisor's conduct is equally unlawful under Title VII whether the employee submits or not." 14 F.3d at 778. However, the D.C. Circuit's decision makes just this illogical distinction. In so doing, the D.C. Circuit's opinion places victims of sexual harassment like Ms. Gary in an untenable situation, forcing them to resist harassment by rejecting and reporting it *and* suffering job-related reprisals in order to maintain a sexual harassment action under a *quid pro quo* theory.[4] That holding is both unrealistic and contrary to the remedial purpose of Title VII. It requires too much of victimized employees who are naturally reluctant to report workplace sexual harassment. As the Second Circuit noted in *Karibian,* Title VII should not be read "to punish

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4. While Ms. Gary rejected Mr. Long's sexual advances, she did not report his verbal harassment or the rape incident because of his threats against her. Although she did not submit to a sexual relationship with him like the plaintiffs in *Karibian* and *Nichols,* hers is still a submission case in the sense that she *submitted* for a long time to his persistent verbal harassment without reporting him and did not immediately report the rape incident because she reasonably feared job-related reprisals.

the victims of sexual harassment who surrender to unwelcome sexual encounters."[5] 14 F.3d at 778.

Moreover, the D.C. Circuit's "economic injury" rule creates perverse incentives in the workplace. If a *quid pro quo* theory — and resulting strict employer liability — exists only when a supervisor is forced to take actual adverse employment action, a perverse incentive is created for the supervisor's threats to be so "effective" that no such action is necessary. *See Karibian*, 14 F.3d at 778 (rule requiring actual economic injury "would only encourage harassers to increase their persistence"). The D.C. Circuit's rule in this case also encourages employers to delegate sufficient authority to supervisors to ensure that their threats will be effective without fear that such delegation will result in *respondeat superior* liability. This is hardly the sort of incentive that Title VII should foster for employers — the group in the best position, and the group chosen by Congress, to ensure a workplace free from sexual harassment.

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5. The D.C. Circuit did not even attempt to distinguish *Karibian*. Despite extensive citation by the parties to that case, it appears nowhere in the D.C. Circuit's opinion, even as a recognition of contrary authority. This irreconcilable split between the Second Circuit and the D.C. Circuit alone provides sufficient grounds for review by this Court.

II.

WHERE SUPERVISORS USE AUTHORITY DELEGATED FROM THEIR EMPLOYERS TO SEXUALLY HARASS EMPLOYEES UNDER THEIR CONTROL, THE EXISTENCE OF REASONABLE EMPLOYER POLICIES PROHIBITING SEXUAL HARASSMENT DOES NOT INSULATE EMPLOYERS FROM TITLE VII LIABILITY AS A MATTER OF LAW UNDER GENERALLY ACCEPTED AGENCY PRINCIPLES.

The D.C. Circuit's opinion in this case is flatly contrary to this Court's directive in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), to look to "agency principles" for guidance to determine whether an employer should be held liable for the creation of a sexually hostile work environment by one of its supervisors. Despite the court's insistence that it "resolve[d] the question of WMATA's liability for Long's conduct by applying common law principles of agency," 59 F.3d at 1397, its opinion rests on no discernible agency law principle, but rather on the court's unprecedented conclusion that employers should be permitted to insulate themselves from liability for the acts of their agents merely by promulgating policies declaring that such acts are forbidden. This conclusion squarely conflicts with both *Vinson* and decisions in the Second and Fourth Circuit Courts of Appeals holding employers liable — despite the existence of employer policies prohibiting sexual harassment — where supervisors used employer-delegated authority to harass. *See Karibian*, 14 F.3d at 780; *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1352-53 (4th Cir. 1995).

While the existence of well-publicized employer policies prohibiting sexual harassment, and grievance procedures for the victims of such harassment, is certainly evidence that an

employer has not been *negligent*, this fact alone does not determine whether an employer is liable for the acts of its supervisors under agency principles. *See Cross v. Alabama State Dept. of Mental Health*, 49 F.3d 1490, 1505-06 (11th Cir. 1995) (rejecting proffered jury instruction that existence of grievance procedure and employees' failure to use it insulates employer from liability). Negligence is just one basis among several for employer liability. *See Restatement (Second) of Agency* § 219(2) (1958) (listing four bases for employer liability, including negligence, for torts committed outside the scope of employment).[6]

The rule of agency law most applicable to this case provides that employers are liable for the unlawful acts of their servants, even if committed outside the scope of their employment, if the servant "was aided in accomplishing the tort by the existence of the agency relationship." *Restatement (Second) of Agency* § 219(2)(d) (1958). The D.C. Circuit rejected application of this rule on the ground that it is over-inclusive, because supervisors are *always* aided in accomplishing unlawful workplace harassment by their status as agents of their employers. 59 F.3d at 1397. However, while the agency relationship always may provide a supervisor with "proximity to, and regular contact with the victim," *id.*, it can also provide far more pernicious power over the victim if the supervisor actively invokes job-related authority to threaten the victim and further his unlawful purposes. *Baskerville v. Culligan International Co.*, 50 F.3d 428, 431-32

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6. Where, as here, sexual harassment occurs in the workplace, during working hours, and is carried out by a supervisor with control over the victim who uses that control to further the harassment, employers also may be held liable under the agency principle embodied in § 219(1) of the *Restatement*: that such harassment is within the scope of employment. *See Martin*, 48 F.3d at 1351 ("A 'forbidden' or even 'consciously criminal or tortious' act may still be within the scope of employment."); *Yates v. Avco*, 819 F.2d 630, 636 (6th Cir. 1987) (same).

(7th Cir. 1995) (noting category of cases in which employer liability may be appropriate, regardless of employer negligence or anti-harassment policies, where "the harassment takes the form . . . of an abuse of authority").

In such circumstances, where a supervisor has mobilized employer-delegated authority against an employee under his control, employer liability is appropriate under either a *quid pro quo* theory of strict liability or a hostile work environment theory applying agency principles such as section 219(2)(d). Under either rationale, both the employer's knowledge of the harassment and the existence of an anti-sexual harassment policy are irrelevant; the employer is still liable. *See Karibian*, 14 F.3d at 780 (employer "would be liable for [supervisor's] alleged harassment regardless of the absence of notice or the reasonableness of [employer's] complaint procedures"); *Martin*, 48 F.3d at 1352-53 (employer liable for supervisor's threats to fire employee regardless of employer anti-harassment policy and grievance procedure).

The D.C. Circuit's attempt to avoid applicable agency principles such as section 219(2)(d) is both flawed and contrary to *Vinson* and cases in other circuits. Focusing on WMATA's anti-sexual harassment and grievance policy, the court below concluded that Ms. Gary "cannot avail herself of the exception described in section 219(2)(d)" because "she could not have believed" that WMATA sanctioned Mr. Long's harassing behavior or gave him authority to act in this manner. 59 F.3d at 1397-98. But this is not the relevant inquiry. While an anti-sexual harassment policy known to employees may make it unreasonable for an employee to believe that sexual harassment is company *policy* or implausible that a supervisor is acting "within the scope of his employment" when he harasses, this does not mean that a victim of harassment in the context of a particular employment setting feels able to report it. What matters is

whether the victimized employee reasonably believes, as here, that reporting the harassment will do no good or will only make things worse for her.

It ignores reality to assert, as the D.C. Circuit has, that a strongly worded employer policy against sexual harassment makes it unreasonable *as a matter of law* for a victim of workplace sexual harassment to believe what a harassing supervisor with authority over her job tells her — that he will get away with his harassment, that no one will believe her, that she will look bad, and that he will make her life on the job miserable if she does report him. Whether in a particular case the employee reasonably feels able to invoke the employer's policy is a question of *fact*, not a matter of law.[7] Contrary to other circuits, the D.C. Circuit's decision in this case allows employers to immunize themselves by adopting policies against sexual harassment and then washing their hands of conduct by their supervisors. However, where a supervisor uses employer-delegated authority to further his harassment, victimized employees should not bear the burden of challenging the adequacy or reasonableness of anti-sexual harassment policies before they may proceed against their employers under Title VII.

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7. In this case, there is no evidence that Ms. Gary felt able to invoke WMATA's anti-sexual harassment policy to protect herself. On the contrary, the undisputed evidence shows that she was afraid to use that policy because of Long's threats.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEVEN G. READE
Counsel of Record
CHARLES W. SCARBOROUGH
KATHLEEN A. BEHAN
ARNOLD & PORTER
Attorneys for Petitioner
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED JULY 28, 1995

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 10, 1995 Decided July 28, 1995

No. 94-7012

CORAMAE ELLA GARY,
APPELLANT

v.

JAMES EDWARD LONG, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia

(90cv03076)

Charles W. Scarborough argued the cause and filed the briefs for appellant.

Woodley B. Osborne argued the cause and filed the brief for appellee Long.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Appendix A

Gerard J. Stief, Associate General Counsel, Washington Metropolitan Area Transit Authority ("WMATA"), with whom *Robert L. Polk*, General Counsel, and *Robert J. Kniaz*, Deputy General Counsel, WMATA, were on the brief, argued the cause for appellee WMATA.

Karen M. Moran, Attorney, United States Equal Employment Opportunity Commission, argued the cause and filed the brief for *amicus curiae*.

Before BUCKLEY, WILLIAMS, and SENTELLE, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* BUCKLEY.

BUCKLEY, *Circuit Judge*: Coramae Ella Gary alleges that her employer, the Washington Metropolitan Area Transit Authority ("WMATA"), and one of its supervisory employees, James Edward Long, violated Title VII of the Civil Rights Act of 1964 and committed various common law torts by subjecting her to sexual harassment. The district court granted appellees' motions for summary judgment, dismissing the Title VII claims against WMATA and refusing to exercise jurisdiction over Gary's common law tort claims. A magistrate judge then dismissed Gary's Title VII claim against Long. We affirm the dismissal of the Title VII claims and remand the others.

I. BACKGROUND

In reviewing a district court's decision on a motion for summary judgment, we must consider the facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Accordingly, the following account of Long's conduct is based on the allegations in Gary's complaint and deposition.

Coramae Gary began working at WMATA in May 1983 and was promoted to the position of stock clerk in 1987. Begin-

ning in April 1988, Long, her second-level supervisor, began a pattern of sexual harassment. Long first attempted to entice Gary into having sexual relations with him through promises that he could make her job easier. After this carrot proved unsuccessful, Long tried using a stick. He repeatedly threatened Gary with adverse employment consequences, including termination of employment, if she did not submit to his advances. Long made crude references to her body, regularly expressed his desire to have sex with her, threatened to "get" her for refusing to meet with him, and indicated that he would have her fired if she told anybody of his sexual advances. Gary unfailingly rejected Long's overtures and made him aware that they were unwelcome.

Long's harassment was not limited to verbal abuse. According to Gary, in May or June of 1989, under the pretext of conducting an inspection of a WMATA construction site, Long drove her to a secluded storage facility and, while driving, fondled her breasts and rubbed his hands between her legs. Upon their arrival at the storage facility, he raped her. Thereafter, Long threatened reprisals if Gary told anyone what had happened. Gary was subsequently in an automobile accident and did not return to work until January 1990, whereupon Long resumed his verbal harassment.

On February 14, 1990, Gary reported Long's sexual harassment to a WMATA counselor and later filed a formal grievance with WMATA. Three months later, Gary filed a charge of sexual harassment with the Equal Employment Opportunity Commission. After receiving a "right to sue" letter from the agency, Gary filed this action against Long and WMATA in the U.S. District Court for the District of Columbia. In her complaint, she alleged that Long and WMATA had discriminated against her in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1) (1988), and that Long and WMATA had committed various common law torts, in-

cluding battery, invasion of privacy, and intentional infliction of emotional distress. Gary's Title VII claim was premised on the "hostile environment" theory of sexual harassment: She alleged that Long's "actions ... created a sexually hostile atmosphere detrimental to [Gary's] emotional and physical health...." Complaint ¶ 13. Gary also argues that her Title VII claim effectively asserts a claim of "*quid pro quo*" sexual harassment. Brief for Appellant at 20–23.

In response to Gary's allegations, WMATA stated that it had not received notice of the alleged sexual harassment until February 28, 1990. On its receipt, WMATA conducted an immediate, detailed investigation of the charges and concluded that there was no corroborating evidence to support them. WMATA also reassigned Gary to another facility where she could avoid further contact with Long.

WMATA noted that, at all relevant times, it had an "active and firm policy against sexual harassment." For example, it sponsored numerous seminars on sexual harassment, issued notices to all employees that such conduct would not be tolerated at any level, published a Civil Rights Policy Statement, prominently displayed the names, photographs, and telephone numbers of its Equal Employment Opportunity Counselors, and established, publicized, and enforced its discrimination complaint procedures. These procedures provided employees with the right to complain informally to EEO Counselors and formally to WMATA's Office of Civil Rights, the right to representation, and the right to an internal review of any unfavorable determinations.

On December 2, 1992, the district court dismissed Gary's Title VII claim against WMATA. In an unpublished opinion, the court held that

> [a]n employer is not liable for the hostile environment created by a supervisor when the employer (1) has done

> nothing to indicate that it sanctions the type of conduct for which the offending supervisor is accused, (2) has a strong policy against sexual harassment and has made available to employees an avenue of complaint which steers clear of the offending supervisor, and (3) takes prompt remedial measures as soon as it is alerted of the situation.

Gary v. WMATA, Civ. A. No. 90–3076 (D.D.C. Dec. 1, 1992) ("Memorandum Opinion and Order"). Without explanation, the court also declined to exercise jurisdiction over Gary's common law tort claims.

By consent of the parties, the district court referred the Title VII claim against Long to a magistrate judge. The magistrate judge dismissed the claim, holding that individual supervisors cannot be held personally liable for monetary damages under Title VII. Gary appeals these decisions.

II. Discussion

A. Gary's Title VII Claim Against WMATA

Title VII makes it unlawful for an employer

> (1) ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex....

42 U.S.C. § 2000e–2(a)(1) (1988). The Supreme Court has held that

> this language is not limited to "economic" or "tangible" discrimination. The phrase "terms, conditions, or privileges of employment" evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment.

Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993) (internal quotation marks omitted). Courts have found sexual harassment to be discriminatory in either of two circumstances: the grant or denial of an economic *quid pro quo* in exchange for sexual favors, *see, e.g., Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 782–83 (1st Cir. 1990); *Highlander v. K.F.C. Nat'l Management Co.*, 805 F.2d 644, 648 (6th Cir. 1986), or discrimination that has created a hostile or abusive work environment. *See, e.g., Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986); *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572, 575 (10th Cir. 1990). In the latter context, the Supreme Court has noted that

> [w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.

Harris, 114 S. Ct. at 370 (internal citations and quotation marks omitted).

Because Title VII only prohibits an "employer" from discriminating on the basis of sex, the question arises as to when courts should impute to the employer the sexual harassment of one employee by another. The statute defines "employer" to include "any agent of" an employer. 42 U.S.C. § 2000e(b) (1988). Although, in *Meritor*, the Supreme Court declined to issue a definitive rule on employer liability for sexual harassment of one employee by another, the Court did offer the following guidance:

> *Congress wanted courts to look to agency principles for guidance in this area.* While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer surely evinces an intent to place some limits on the acts of employees for

> which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. *See generally Restatement (Second) of Agency* §§ 219–237 (1958). For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability.

Meritor, 477 U.S. at 72 (internal citations omitted) (emphasis added). Accordingly, in determining whether an employer may be held liable, under Title VII, for acts of sexual harassment, we will apply the common law principles of agency, with particular reliance on the Restatement (Second) of Agency ("Restatement").

1. Quid Pro Quo *Sexual Harassment*

As the name suggests,

> [t]he gravamen of a *quid pro quo* claim is that a tangible job benefit or privilege is conditioned on an employee's submission to sexual black-mail and that adverse consequences follow from the employee's refusal.

Carrero v. New York City Hous. Authority, 890 F.2d 569, 579 (2d Cir. 1989); *see also Meritor*, 477 U.S. at 76 (Marshall, J., concurring in judgment) ("[E]very Court of Appeals that has considered the issue has held that sexual harassment by supervisory personnel is automatically imputed to the employer when the harassment results in tangible detriment to the subordinate employee."); *Chamberlin*, 915 F.2d at 783 (*quid pro quo* harassment exists where victim's response to unwelcome sexual advances affects "tangible aspects of her compensation, terms, conditions, or privileges of employment") (ellipses omitted); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir. 1987) (same).

Although not explicitly alleged in her complaint, Gary asserts that Long's conduct gave rise to a Title VII claim

under a *quid pro quo* theory of sexual harassment. She argues that "[w]hen, as in this case, the conduct creating a hostile work environment consists of work-related threats and promises by a supervisor with actual or apparent authority to make good on those threats and promises, the distinction between the *quid pro quo* and hostile work environment theories makes no practical difference." Brief for Appellant at 23.

WMATA counters that Long's conduct cannot properly be characterized as *quid pro quo* harassment because he lacked the authority to fire or suspend Gary. WMATA also asserts that because, in her complaint, Gary limited her sexual harassment claim to a hostile work environment theory, she cannot raise a *quid pro quo* theory for the first time on appeal. We need not address these defenses however, because even assuming that a *quid pro quo* theory is properly before this court, we agree that there can be no such harassment in this case.

Under the circumstances alleged here, it takes more than saber rattling alone to impose *quid pro quo* liability on an employer; the supervisor must have wielded the authority entrusted to him to subject the victim to adverse job consequences as a result of her refusal to submit to unwelcome sexual advances. *See Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993) ("If the plaintiff can show that she suffered an economic injury from her supervisor's actions, the employer becomes strictly liable without any further showing of why the employer should be responsible for the supervisor's conduct.") (quoting *Kotcher v. Rosa and Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992); *Kauffman v. Allied Signal, Inc., Autolite Div.*, 970 F.2d 178, 186 (6th Cir. 1992) ("[T]he employee's refusal to submit to the supervisor's sexual demands [must have] resulted in a tangible job detriment.") (quoting *Highlander*, 805 F.2d at 648); *Hicks*, 833

F.2d at 1414 (*quid pro quo* sexual harassment exists when adverse job consequences result from employee's refusal to submit to sexual advances); *Highlander*, 805 F.2d at 649 (no cause of action for *quid pro quo* sexual harassment where "the record [is] totally devoid of any evidence tending to demonstrate that plaintiff was denied a job benefit or suffered a job detriment as a result of her failure to engage in the activity suggested by [defendant]"); *but see Nichols v. Frank*, 42 F.3d 503, 513 (9th Cir. 1994) ("[A] supervisor's intertwining of a request for the performance of sexual favors with a discussion of actual or potential job benefits or detriments in a single conversation constitutes quid pro quo sexual harassment."). To hold otherwise would be to impose liability on the employer without evidence that the supervisor has acted as its agent. Although Gary alleged that Long repeatedly threatened her with adverse job consequences if she did not submit to his sexual advances, those threats were not carried out. Accordingly, we hold that Gary has failed to make out a claim of *quid pro quo* sexual harassment.

2. Hostile Work Environment Sexual Harassment

Whereas a supervisor's mere threat or promise of job-related harm or benefits in exchange for sexual favors does not constitute *quid pro quo* harassment, either may create or contribute to a hostile work environment. Such conduct will be actionable if it is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Meritor*, 477 U.S. at 67 (internal brackets and quotation marks omitted). As the Supreme Court noted in *Harris*,

> Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from

> advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their ... gender ... offends Title VII's broad rule of workplace equality.

Harris, 114 S. Ct. at 370–71.

There is no doubt that Long's alleged conduct was sufficiently severe and pervasive to create a hostile work environment. If proven to be true, Long's repeated verbal and physical harassment of Gary, culminating in a rape, is "not only pervasive harassment but also criminal conduct of the most serious nature" that is "plainly sufficient to state a claim for 'hostile environment' sexual harassment." *Meritor*, 477 U.S. at 67.

The question remains, however, whether WMATA may be held liable for the appalling conduct attributed to Long. WMATA argues that in order to hold an employer liable for a hostile work environment, the plaintiff must demonstrate that the employer knew or should have known of the alleged harassment and failed to take remedial action. Gary concedes that the "knew or should have known" standard is appropriate in certain circumstances, but argues that where a supervisor invokes his power as a supervisor to create a hostile work environment, employer liability is appropriate even absent the employer's actual or imputed knowledge of the harassment.

We resolve the question of WMATA's liability for Long's conduct by applying common law principles of agency. As a general rule, "[a] master is not subject to liability for the torts of his servants acting outside the scope of their employment...." Restatement § 219(2). In certain circumstances, however, a master may be held liable for the servant's conduct outside the scope of his employment. *See* Restate-

ment §§ 219(2)(a)-(d). The exception to the rule on which Gary relies is described in section 219(2)(d). It provides that the master may be held liable if

> the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, *or he was aided in accomplishing the tort by the existence of the agency relation.*

Id. § 219(2)(d) (emphasis added). Gary argues that WMATA falls within this exception to the general rule because Long was aided by his employer-delegated authority in carrying out the harassment.

In a sense, a supervisor is always "aided in accomplishing the tort by the existence of the agency" because his responsibilities provide proximity to, and regular contact with, the victim. As Judge MacKinnon noted some years ago, however, such a reading of section 219(2)(d) "argue[s] too much." *Barnes v. Costle*, 561 F.2d 983, 996 (D.C. Cir. 1977) (MacKinnon, J., concurring). The commentary to the Restatement suggests that this exception embraces a narrower concept that holds the employer liable only if the tort was "accomplished by an instrumentality, or through conduct associated with the agency status." *Id.* (citing Restatement § 219 cmt. e). Thus a telegraph company may be held liable for a tort committed by a telegraph operator who sends a false telegraph message, as may the undisclosed principal of a store whose manager cheats a customer. *Id.* In such cases, "[l]iability is based upon the fact that the agent's position facilitates the consummation of the [tort], in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him." Restatement § 261 cmt. a; *see also id.* § 219 cmt. e (citing § 261 in discussion of § 219(2)(d)).

Gary, however, cannot avail herself of the exception described in section 219(2)(d) for one overriding reason. Unlike the individual who received the false telegram or who was cheated by the store manager, she could not have believed (and nor does she claim) that Long was acting within the color of his authority. It is a general principle of agency law that

> [i]f a person has information which would lead a reasonable man to believe that the agent is violating the orders of the principal or that the principal would not wish the agent to act under the circumstances known to the agent, he cannot subject the principal to liability.

Restatement § 166 cmt. a. As the Third Circuit noted in *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103 (3d Cir. 1994),

> [o]ur agency precedent requires the belief in the agent's apparent authority to be reasonable before the principal will be bound. This theory reconciles the exonerating effect of a remedial policy, which appears to stem from the negligence principles of § 219(2)(b) [("the master was negligent or reckless")], with the apparent authority theory of § 219(2)(d). It also indicates that the reasonableness of the employee's perception of the combined message from the harasser and the employer is important.

Id. at 109 (internal citations omitted).

Based on the above, we conclude that an employer may not be held liable for a supervisor's hostile work environment harassment if the employer is able to establish that it had adopted policies and implemented measures such that the victimized employee either knew or should have known that the employer did not tolerate such conduct and that she could report it to the employer without fear of adverse consequences. *Cf. Meritor*, 477 U.S. at 72–73 (employer's nondis-

crimination policy not dispositive because it failed to address sexual harassment and grievance procedure that required complaints first to be lodged with supervisor who, in that case, was the alleged harasser). While a supervisor might purport to act or speak on behalf of the employer, there can be no liability if the victim could not reasonably rely on the supervisor's representations.

Significantly, Gary does not dispute that WMATA had an active policy against sexual harassment, conceding at oral argument that there is "no challenge to the adequacy of WMATA's procedures in terms of providing avenues for relief for sexual harassment" and that there is no claim that these procedures were not known by the employees. In light of that concession, we find that Gary could not have reasonably believed that Long had the authority, apparent or otherwise, to sexually harass her. Therefore, we hold that WMATA is not liable under section 219(2)(d) for Long's alleged sexual harassment.

We do not suggest that an employer must be found liable under Title VII if it has failed to adopt such measures; a determination of liability will always require the application of the law of agency to the particular facts of the case. Rather, we hold that when, as here, an employer has taken energetic measures to discourage sexual harassment in the workplace and has established, advertised, and enforced effective procedures to deal with it when it does occur, it must be absolved of Title VII liability under a hostile work environment theory of sexual harassment. That defense depends, of course, on the ability of the employer to establish that its employees could not reasonably have failed to know of those measures and that its grievance procedures were clearly "calculated to encourage victims of harassment to come forward." *Id.* at 73.

In this case WMATA had pursued an active and firm policy against sexual harassment throughout the period of Gary's

alleged mistreatment. WMATA had sponsored seminars on the subject, distributed staff notices to all employees informing them that sexual harassment would not be tolerated, publicized its Civil Rights policy statement, and made available to all employees the names and telephone numbers of the EEO Counselors to whom they could report acts of discrimination.

WMATA also had a detailed grievance procedure for the formal and informal internal processing and review of discrimination complaints. As a result of Gary's complaint, for example, a WMATA attorney met with Gary's attorney, interviewed all persons concerned; and, although he determined that there was no corroborating evidence to support her claim, WMATA's General Counsel granted Gary's request to be transferred to another facility to avoid contact with Long. We find such a detailed and thorough grievance procedure to be "calculated to encourage victims of harassment to come forward." *Meritor*, 477 U.S. at 73.

B. Gary's Title VII Claims Against Long

As noted earlier, Gary asserts that Long is directly liable under Title VII for his acts of sexual harassment. In doing so, she relies on Title VII's definition of "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees ... *and any agent of such a person* ...." 42 U.S.C. § 2000e(b) (emphasis added). Gary argues that the "plain and unambiguous language" of section 2000e(b) can only mean that Long, as an "agent" of WMATA, is an "employer" liable under section 2000e–2(a)(1) for discriminating against her on the basis of her sex.

While a construction of the statute to impose individual liability on an agent is facially plausible, we agree with the Ninth Circuit that "[t]he obvious purpose of this agent provi-

sion was to incorporate respondeat superior liability into the statute." *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) (brackets and internal quotation marks omitted). Thus, while a supervisory employee may be joined as a party defendant in a Title VII action, that employee must be viewed as being sued in his capacity as the agent of the employer, who is alone liable for a violation of Title VII. *See Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991) (holding that "relief granted under Title VII is against the *employer*, not individual employees whose actions constituted a violation of [Title VII]" (emphasis in original)).

Considering the evidence in the light most favorable to Gary, we find that Long qualifies as an "employer" under Title VII because he served in a supervisory position. Because Long cannot be held liable in his personal capacity, however, Gary's claim against him essentially merges with her claim against WMATA. *See Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993) (claim against supervisor "is a claim against Salt Lake County itself"); *Busby*, 931 F.2d at 772. Accordingly, we conclude that the magistrate judge did not err in dismissing Gary's Title VII claim against Long.

C. Jurisdiction over the Common Law Tort Claims

In addition to her Title VII claims, Gary alleges that WMATA and Long were liable for several common law torts, including battery, invasion of privacy, and intentional infliction of emotional distress. The district court declared that it would not exercise *pendent* jurisdiction over those claims, but did not explain why. Memorandum Opinion and Order at 2 (emphasis added).

As an initial matter, we hold that the district court had original jurisdiction over Gary's common law tort claims against WMATA. Under District of Columbia law, "[t]he United States District Courts shall have original jurisdiction,

concurrent with the Courts of Maryland and Virginia, of all actions brought by or against [WMATA]...." D.C. Code Ann. § 1–2431(81) (1981). WMATA acknowledges that, "at least insofar as WMATA was concerned, both the Title VII and common law [tort] claims were properly before the District Court under original, not 'pendent,' jurisdiction." Brief for WMATA at 27. Thus the court erred in refusing to hear Gary's common law tort claims against WMATA.

In arguing that the district court erred in refusing to exercise pendent jurisdiction over the common law tort claims against both WMATA and Long, Gary relies on subsection (a) of 28 U.S.C. § 1367 (Supp. III 1991), which provides that

> in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy....

Under subsection (c), however, "district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a)" under any one of four circumstances. *Id.* § 1367(c). As we have recently pointed out, "[w]hether actually to decide [the pendent claims] is a matter left to the sound discretion of the district court, guided by consideration of the factors enumerated in 28 U.S.C. § 1367(c)...." *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1265–66 (D.C. Cir. 1995).

The district court may or may not have erred in declining to exercise supplemental jurisdiction over the common law tort claims against Long; but without knowing its reasons, we cannot determine whether it abused its discretion under the statute, or even whether it had any to exercise. Because the common law claims against him were "so related to [the common law] claims [against WMATA] ... that they form

part of the same case or controversy ...," 28 U.S.C. § 1367(a), the district court clearly had pendent jurisdiction over them. Whether it had the authority to refuse to hear them depended on the presence of one of the factors described in section 1367(c).

Accordingly, we remand the question to the district court. If it determines that it has the authority to decline supplemental jurisdiction over the common law claims against Long and decides to exercise it, the district court should either remand the claims to the courts of the District of Columbia or dismiss them without prejudice to permit Gary to file her claims there. *See Edmondson & Gallagher*, 48 F.3d at 1267.

III. Conclusion

The goal of Title VII is "to strike at the entire spectrum of disparate treatment of men and women in employment." *Meritor*, 477 U.S. at 64 (internal quotation marks omitted). Discriminatory conduct that is so severe or pervasive that it creates a work environment abusive to employees because of their sex offends this "broad rule of workplace equality." *Harris*, 114 S. Ct. at 371. The mere fact that an individual perpetrates sexual misconduct while in the employ of another, however, does not *ipso jure* render that action violative of Title VII.

On applying traditional common law principles of agency to the facts before us, we hold that Gary has failed to support her Title VII sex discrimination claim against WMATA on either a *quid pro quo* or hostile work environment basis. She failed to establish the first because Long did not exercise his delegated authority to impose economic harm on her. Nor could she hold WMATA responsible for Long's creation of a hostile work environment because in light of WMATA's preventive policies and remedial practices, Gary knew, or should have known, that Long's conduct was unauthorized.

We therefore affirm the district court's dismissal of Gary's Title VII claim against WMATA. We also affirm the magistrate judge's dismissal of that claim against Long because Title VII does not impose individual liability on supervisory employees. We remand the common law claims against WMATA and Long, however, because the district court has original jurisdiction over the former and must consider the propriety of asserting pendent jurisdiction over the latter.

So ordered.

APPENDIX B — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA FILED JANUARY 3, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-3076
(SS) / (AK)

CORAMAE ELLA GARY,

Plaintiff,

v.

EDWARD LONG,

Defendant.

Memorandum Order

On December 2, 1992, United States District Court Judge Stanley Sporkin dismissed Plaintiff Coramae Ella Gary's claims against the Washington Metropolitan Area Transit Authority (WMATA) in the above-referenced action. Judge Sporkin also declined pendent jurisdiction over Plaintiff's common law claims against Edward Long, leaving only a sexual harassment claim against Mr. Long under Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. §§2000e to e-17). By consent of the parties the Title VII claim against Mr. Long in his individual capacity was referred to the undersigned pursuant to 28 U.S.C. §636(c).

In a Memorandum Opinion and Order filed on November 9,

Appendix B

1993, this Court ruled that Title VII does not provide for monetary damages against individuals as agents of employers, and therefore Mrs. Gary could not collect monetary damages from Mr. Long. Because Plaintiff has not been under Mr. Long's supervision at WMATA since May, 1990, Mrs. Gary would not benefit from any order granting injunctive relief.

Accordingly, the Court finding that no justiciable case or controversy remains in this case, it is this 3rd day of January, 1994, hereby

ORDERED, that this case be and the same is hereby dismissed with prejudice.

s/ Alan Kay
ALAN KAY
UNITED STATES
MAGISTRATE JUDGE

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA FILED NOVEMBER 9, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-3076

(SS)/(AK)

CORAMAE ELLA GARY,

Plaintiff,

v.

EDWARD LONG,

Defendant.

MEMORANDUM OPINION AND ORDER

In this action, Plaintiff Coramae Ella Gary, an employee of the Washington Metropolitan Area Transit Authority (WMATA), has sued her former supervisor, Edward Long, for sexual harassment under Title VII of the Civil Rights Act of 1964, Pub. L. No. 88352, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to e-17). Mrs. Gary is suing for back pay, compensatory and punitive damages, and "such other relief as justice may require."[1]

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1. Plaintiff's original complaint, filed on December 19, 1990, sought only declaratory and injunctive relief with respect to her Title VII claim. On June 25, 1993, Plaintiff moved to amend her complaint to add claims for monetary damages (Cont'd)

Appendix C

Defendant Long has filed a motion for summary judgment or, in the alternative, for partial summary judgment. Long has moved for summary judgment on the ground that Gary failed to name him in the administrative charge she filed with the Equal Employment Opportunity Commission (EEOC). According to Long, Title VII requires aggrieved individuals to name any prospective defendant in a complaint with the EEOC before filing suit in federal court.

In the alternative, Long has moved for partial summary judgment, arguing that he is not liable under Title VII for monetary damages because he is an individual, not an "employer." According to Long, Title VII imposes monetary liability only on "employers;" individuals are only liable for declaratory or injunctive relief.[2]

I. *Factual Background*

Plaintiff Coramae Gary began working as a stock clerk at WMATA in 1983. She claims that Mr. Long, her supervisor in the stock clerk position, sexually harassed her over a period of

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(Cont'd)

on the ground that monetary damages became available to victims of discrimination under § 102 of the 1991 amendments to the Civil Rights Act, Pub. L. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. §§ 1981a). On October 6, 1993, this Court granted Plaintiff's unopposed motion.

2. The Court is mindful of the fact that Plaintiff's claim for compensatory and punitive damages under the 1991 amendments to the Civil Rights Act ultimately depends on whether the 1991 amendments will be given retroactive effect. The Supreme Court will be addressing the issue this term in *Landaraf v. USI Film Products*, No. 92-757; *Rivers v. Roadway Express*, No. 92-938, *cert. granted*, May 24, 1993, 113 S. Ct. 2410.

several years. Specifically, Mrs. Gary alleges that Mr. Long regularly suggested that they have sex, commented on her appearance, and suggested that he would treat her more favorably if she had sex with him. Mr. Long also suggested that if Mrs. Gary did not comply with his sexual demands, her job and her husband's job would be threatened. Ultimately, Mrs. Gary alleges, Mr. Long raped her during working hours at an empty WMATA warehouse.

Mrs. Gary first complained about Mr. Long's behavior to a management official at WMATA on February 14, 1990. On or about February 22, 1990, she took a leave of absence from WMATA. She then retained an attorney who wrote a letter to WMATA dated February 28, 1990.

WMATA subsequently launched an internal investigation of Mrs. Gary's allegations. As part of the investigation, counsel for WMATA, Mr. Bruce Heppen, deposed Mr. Long and interviewed various other WMATA officials. Mr. Heppen was unable to corroborate Mrs. Gary's allegations, and he summarized his findings in a memorandum dated April 24, 1990.

Sometime in May, 1990, Mrs. Gary returned to WMATA from her leave of absence. She did not, however, return to work under the supervision of Mr. Long.

Mrs. Gary filed a formal "Charge of Discrimination" with the EEOC on May 16, 1990. The pre-printed form provided by the EEOC included a space for Mrs. Gary to insert her name, address, and telephone number. The form also included a space for her to insert the name of her employer. Mrs. Gary named the Washington Metropolitan Area Transit Authority, and provided WMATA's address and phone number.

Appendix C

The EEOC form also included a large blank box which required Mrs. Gary to describe the "particulars" of her complaint. In the box, Plaintiff stated:

> I. I began working for the above-named employer on 5/16/83. During the period extending from 4/89 to 2/14/90, I was subjected to sexist remarks and unwelcome sexual advances by the male Superintendent in my position as Stock Clerk.
>
> II. I was given no reasons for this treatment.
>
> III. I believe that I was discriminated against because of my sex, female, in violation of Title VII of the Civil Rights Act of 1964, As Amended.

The EEOC declined to investigate or conciliate Mrs. Gary's charge or to file a lawsuit on her behalf. On September 28, 1990, the EEOC sent Mrs. Gary a letter captioned "EEOC Charge Against Washington Metropolitan Area Transit Authority No. 120900824," in which she was notified of her right to file a civil action against "the above-named respondent."

On December 19, 1990, Mrs. Gary filed the instant action naming WMATA and Long as defendants. In addition to alleging sexual harassment under Title VII, Mrs. Gary asserted pendent state law claims against both Defendants. The Title VII claim against WMATA and the state law claims against both defendants were dismissed in a Memorandum Opinion and Order issued by United States District Court Judge Stanley Sporkin on December 2, 1992. Only the Title VII claim against Mr. Long remains.

Appendix C

II. *Legal Standards*

In evaluating Defendant's claims, the Court applies Fed. R. Civ. P. 56. Under Rule 56, a court may enter summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which the party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment should be granted only if no genuine issue of material fact exists and if the moving party is entitled to judgment as a matter of law.

A disputed factual matter is a "genuine" issue "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Material" facts are facts in dispute that "might affect the outcome of the suit under the governing law." *Id.*

A court considering a summary judgment motion must view inferences drawn from the underlying facts submitted into evidence in a light most favorable to the party opposing the motion. *Jackson v. University of Pittsburgh*, 826 F.2d 230, 232 (3d Cir. 1987), *cert. denied*, 484 U.S. 1020 (1988), citing *Goodman v. Mead Johnson & Co.*, 534 F. 2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). The non-movant's allegations must be taken as true, and when in conflict with those of the moving party, the former must receive the benefit of the doubt. *Jackson*, 826 F. 2d at 232.

III. *Failure to Name Defendant Long in EEOC Complaint*

Under Title VII, before filing suit in federal court an aggrieved individual must first file a complaint with the EEOC.

Appendix C

The EEOC decides whether to investigate or conciliate the charge, or whether to issue the individual a "right-to-sue" letter. If the EEOC issues a "right-to-sue" letter, the individual may file suit, but only "against the respondent named in the charge." 42 U.S.C. § 2000e-5(f)(1).

In her EEOC charge, Plaintiff named only WMATA as her employer. In the body of her charge of discrimination, she stated that she was "subjected to sexist remarks and unwelcome sexual advances by the male Superintendent in my position as Stock Clerk."

Defendant acknowledges that he is referenced in the body of the charge, but argues that he is not the person "named" in the charge which Plaintiff filed with the EEOC. Plaintiff argues that for all practical purposes her complaint "named" Mr. Long because Plaintiff worked for only one "male Superintendent" at WMATA, and that person was Mr. Long.

The Court must evaluate the EEOC charge in light of the general principle that the jurisdictional requirements under Title VII are to be liberally construed in light of that statute's remedial purposes. *Bell v. Brown,* 557 F.2d 849, 853 (D.C. Cir. 1977); *Glus v. G.C. Murphy Co.,* 562 F.2d 880, 887-888 (3d Cir. 1977). The procedural mechanisms in Title VII were not intended "to serve as a stumbling block to the accomplishment of the statutory objective." *Evans v. Sheraton Park Hotel,* 503 F.2d 177, 183 (D.C. Cir. 1974).

Therefore, where an individual is referenced in the body of the charge but is not named in the charge, a court may look to whether the underlying purposes of the naming requirement have been met. *See, e.g., Eagleston v. Chicago Journeyman Plumbers'*

Local Union No. 130, 657 F. 2d 890, 905 (7th Cir. 1981), *cert. denied*, 454 U.S. 1017 (1982). These purposes are to provide notice to the charged party and an opportunity for voluntary compliance with Title VII without resort to litigation. *Id.*

The Third Circuit, in recognizing an equitable exception to the requirement that a defendant must be named in the EEOC charge, crafted a four part test for determining whether the purposes of the naming requirement have been fulfilled:

> 1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint; 2) whether, under the circumstances, the interests of a named are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings; 3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; 4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party.

Glus, 562 F.2d at 888.[3]

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3. At least three other Circuits have adopted the *Glus* four-part test. *See Johnson v. Palma*, 931 F.2d 203, 209 (2d Cir. 1991); *Romain v. Kurek*, 836 F.2d 241, 245 (6th Cir. 1987); *Eagleston*, 657 F.2d at 907 (7th Cir. 1981).

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Applying the four criteria to the facts of the instant case, only the first one supports Defendant's position: Mrs. Gary could have easily ascertained the identity of Mr. Long. The remaining three criteria support Plaintiff's position that the underlying purposes of the naming requirement were met.

The second criteria requires the court to consider whether WMATA and Mr. Long's interests were so similar that, for the purpose of securing his compliance with Title VII, it would have been unnecessary to name Mr. Long in the EEOC complaint. This Court finds that Mr. Long's interests and WMATA's interests were identical in May, 1990, when Plaintiff filed her EEOC complaint. Their interests were identical because under Title VII, if an employer is on notice about sexual harassment by one of its employees but fails to take prompt remedial action, the employer may be held liable for that employee's conduct.[4] Consequently, once WMATA received notice that it was named in an EEOC complaint, to avoid its own liability WMATA clearly would have secured Mr. Long's compliance with Title VII.[5] *Eggleston*, 657 F.2d at 908.

The third criteria enunciated in *Glus* — prejudice to the unnamed party caused by his or her absence from the EEOC

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4. Liability for sexual harassment "exists where the corporate defendant knew or should have known of the harassment and failed to take prompt remedial action against the supervisor." *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989).

5. In fact, prior to filing her EEOC complaint in May, 1990, Plaintiff had complained to WMATA officials, who immediately launched an internal investigation of her allegations of sexual harassment by Mr. Long. Judge Sporkin dismissed WMATA from this case finding that WMATA had taken remedial action as soon as it became aware of the harassment.

"proceedings" — also favors Plaintiff. Here, the EEOC declined to investigate or conciliate the charges. As a result, there were no "proceedings" from which Mr. Long was absent, resulting in no actual prejudice.[6]

Application of the fourth criteria also supports Plaintiff's position. After February, 1990, Mrs. Gary did not work with Mr. Long. He was no longer her supervisor. By the time Mrs. Gary filed her complaint with the EEOC in May, 1990, Mr. Long's relationship with Mrs. Gary, if it existed at all, existed only through WMATA.

Accordingly, this Court finds that Mrs. Gary's EEOC complaint satisfies the notice and conciliation requirements of Title VII even though it did not refer to Mr. Long by name.

IV. *Individual Liability Under Title VII*

Under Title VII, an aggrieved individual may sue her "employer" for declaratory and injunctive relief, including reinstatement and backpay. The 1991 amendments to Title VII expanded employer liability to include compensatory and punitive damages for aggrieved individuals. 42 U.S.C. § 1981a. Title VII defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such person." 42 U.S.C. § 2000e(b).

Defendant takes the position that individuals, when found to be agents within the context of Title VII, can be sued for declaratory or injunctive relief, but cannot be held personally

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6. Even if Mrs. Gary had named Mr. Long as a party, he could not have prevented the EEOC from issuing a right-to-sue letter.

liable for monetary damages — including back pay as authorized by Title VII, and compensatory or punitive damages as authorized by the 1991 amendments to the Civil Rights Act. Defendant argues that notwithstanding their status as agents, individuals are not "employers" under the Act because an "employer" is, by definition, a person with 15 or more employees. Plaintiff argues that because "agents" of employers are considered "employers" themselves, Congress must have intended such "agents" to be held personally liable for monetary damages.

This Court is aware of only case in this jurisdiction to address the issue of an individual's liability under Title VII. In *Thompson v. Intern. Ass'n of Machinists,* 580 F. Supp. 662 (D.D.C. 1984), United States District Court Judge June Green held that four officers of the defendant union were "employers" because they participated in the "decisionmaking process that form[ed] the basis of the plaintiff's charge of discrimination." *Id.*, citing *Jones v. Metropolitan Denver Sewage Disposal District No. 1,* 537 F. Supp. 966, 970 (D. Colo. 1982). The "decisionmaking process" at issue in *Thompson* involved the decision to terminate Thompson's employment. She argued that her employer improperly reached this decision on the basis of her race and sex.

The rationale of *Thompson* has no application to this case, because no "decisionmaking process" was involved in Mr. Long's alleged harassment of Mrs. Gary; to the contrary, Mr. Long's alleged sexually harassing actions were not authorized by WMATA. More importantly, the court in *Thompson,* while finding that the individual defendants were "employers," did not reach the question of whether "agents" may be held liable for monetary relief in the absence of monetary liability of their employer.

Appendix C

The legislative history sheds no light on Congress' intent when it included the term "agent" in the definition of "employer" in Title VII, but in *Miller v. Maxwell's International*, 991 F.2d 583 (9th Cir. 1993), the Ninth Circuit held that Congress could not have intended that individuals be held personally liable as employers for monetary relief. The Court relied, in part, on the statute's limitation of liability to "employers" with fifteen or more employees, noting that the purpose of this limitation was to avoid burdening "small entities with the costs associated with litigating discrimination claims." *Id.* at 587. The court then concluded that if Congress sought to avoid exposing small business to such liability, then Congress could not have intended to expose individuals to such liability. *Id.*

The court found no significance to the use of the term "agent" in the definition of "employer" other than to incorporate respondeat superior liability into Title VII, reasoning that:

> [n]o employer will allow supervisory or other personnel to violate Title VII when the employer is liable for the Title VII violation. An employer that has incurred civil damages because one of its employees believes he can violate Title VII with impunity will quickly correct that employee's erroneous belief . . . There is no reason to stretch the liability of individual employees beyond the respondeat superior principle intended by Congress.

Miller, 991 F.2d at 588.

This Court recognizes, as Plaintiff points out, that respondeat superior liability of an employer will not in all cases assure an employee's compliance with Title VII. Indeed, in the

case at bar, and assuming the truth of Plaintiff's allegations, WMATA's awareness that it could be held liable for sexual harassment by its employees apparently failed to prevent Mr. Long from harassing Mrs. Gary.

Despite the acknowledged weaknesses of the argument that the threat of respondeat superior liability will serve as a deterrent to sexual harassment, this Court concurs with the Ninth Circuit's contention that Congress included the term "agent" in the definition of employer merely to insure the principal's liability through the respondeat superior principle.[7] The phrase "and any agent of such person" modifies "employer" by expanding the scope of employer liability. It does not, as Plaintiff suggests, create a separate class of employers subject to joint and several liability.[8]

Further support for the Court's conclusion can be found in the provisions of the 1991 amendments to the Civil Rights Act authorizing a sliding scale of damage ceilings that can be recovered under Title VII. These ceilings are linked to the number of employees of the defendant employer. The lowest ceiling — $50,000.00 — applies to employers with between 15 and 100

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7. The Ninth Circuit's view is consistent with the Supreme Court's holding in *Meritor Sav. Bank, FSB v. Vinson*, 106 Sup. Ct. 2399 (1986), which recognized "hostile environment" sexual harassment as a cause of action under Title VII. In discussing the scope of employer liability, the Court held that "Congress wanted courts to look to agency principles for guidance . . . Congress' decision to define 'employer' to include any 'agent' of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Id.* at 2408.

8. This analysis is limited to Title VII liability and is not related to an individual's liability for damages stemming from claims of discrimination under state or common law.

employees, and the highest ceiling — $300,000.00 — applies to employers with over 500 employees. Employers with fewer than 15 employees are not liable for compensatory or punitive damages. *See* 42 U.S.C. § 1981(b).

This statutory calculus is virtually impossible to apply to individual employees. In applying these ceilings to decide the amount of damages that can be imposed upon an individual found to be an "employer," the court must consider the number of employees of that "employer." Left ambiguous by the statute is which employees a court should consider to ascertain the applicable ceiling. Must the court look to the total number of employees on the company payroll or the number of employees supervised by the individual against whom a monetary judgment can be rendered?

Either analysis could lead to anomalous results: Low salaried individuals found to be "employers," if they work for large corporations or supervise many employees, could be vulnerable to substantial monetary liability; or, equally anomalous, highly compensated individuals who happen to work for small businesses or who happen to supervise few persons would have less damage exposure.

It is readily apparent that imposition of such liability on an individual would defeat the clear purpose of the 1991 amendments to the Civil Rights Act to link maximum liability to an employer's financial resources. Moreover, application of the amendments to individuals would defeat the purpose of the punitive component of the damage award. This Court thus concludes that the 1991 amendments to the Civil Rights Act support a finding that Congress, in enacting Title VII and its 1991 amendments, did not intend to hold individuals personally liable for monetary damages.

Appendix C

In the absence of legislative history explaining the purpose of including "agents" of employers in the definition of "employer," the Court declines Plaintiff's invitation to adopt the contrary view that the reference to "agents" evinces a legislative intent to impose monetary damage liability on individuals. *See, e.g., Paroline v. Unisys Corp.*, 879 F.2d 100, 106 (4th Cir. 1989), *cont'g in effect in rel. part, vac. in part on other grounds*, 900 F.2d 27 (4th Cir. 1990) (en banc); *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir. 1986); *Showalter v. Allison Reed Group, Inc.*, 767 F. Supp. 1205 (D.R.I. 1991), *aff'd sub nom. Phetosomphone v. Allison Reed Group, Inc.*, 984 F.2d 4 (1st Cir. 1993). Accordingly, for the above reasons, the Court finds that Mr. Long, although he was sufficiently named as a Defendant under Title VII, cannot be held personally liable for monetary damages under Title VII.

V. *Conclusion*

It is therefore this 9th day of November, 1993, hereby

ORDERED, that Defendant's Motion for Summary Judgment on the ground that Plaintiff failed to name Defendant Long in her complaint to the EEOC is DENIED; and Defendant's Motion for Partial Summary Judgment on the ground that Mr. Long cannot be held liable for monetary damages under Title VII is GRANTED; and it is further

ORDERED, that the parties will appear for a status conference on the 1st day of December, 1993, at 10:00 AM.

s/ Alan Kay
ALAN KAY
UNITED STATES MAGISTRATE JUDGE

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA FILED DECEMBER 2, 1992

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-3076
(Stanley Sporkin)

CORAMAE ELLA GARY,

Plaintiff,

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY

AND

EDWARD LONG,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff, Coramae Gary, is employed as a stock clerk by defendant Washington Metropolitan Transit Authority ("WMATA"). Defendant Edward Long is a supervisory employee with WMATA; he has been employed by WMATA for 19 years. Plaintiff alleges that she was subjected to a sexually hostile environment at work which was detrimental to her emotional and physical health and interfered with her work performance, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq. In addition to her Title VII claim,

plaintiff asserts the common law torts of battery, invasion of privacy and intentional infliction of emotional distress against both defendant WMATA and Mr. Long. She also asserts a claim of negligence against defendant Long.[1] Both defendants have filed summary judgment motions. Regarding plaintiff's Title VII claim, for the reasons discussed below, defendant Long's motion is denied; WMATA's motion for summary judgment is granted. The Court will not exercise its pendant jurisdiction over plaintiff's common law claims; accordingly, counts II and VI are dismissed.

For purposes of summary judgment, the Court must consider the facts in the light most favorable to the nonmoving party — in this case, the plaintiff. If there are any material facts in dispute, upon which a reasonable finder of fact could find for the plaintiff, summary judgment must be denied.

I. *Facts.*

For purposes of the instant motions the facts are as follows. Ms. Gary was first hired by WMATA in 1983 as a custodian in WMATA's Department of Rail Service. She accepted a position as a stock clerk at WMATA's Brentwood facility in May 1987. Her immediate supervisor at Brentwood was Mr. Charles Brown. Defendant Long was Mr. Brown's supervisor and Ms. Gary's second-level supervisor.

In June 1989, WMATA relocated its warehouse personnel, including stock clerks such as Ms. Gary, to a new facility, the Metro Supply Facility (MSF), in New Carrellton, Maryland.

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1. Plaintiff has dismissed, without prejudice, a claim against WMATA for negligent hiring/supervision.

Sometime before this move, plaintiff alleges that Mr. Long began sexually harassing her.[2] Among other things, plaintiff alleges that Mr. Long told her how nice she looked, that he had been watching her, and that he wanted to get together with her. She alleges that Mr. Long told her how easy it would be for her at work if she would have a sexual relationship with him. Plaintiff says that such conversations and comments occurred regularly and that Mr. Long threatened to have her and her husband, also employed by WMATA, fired if she told anyone about them.

Around June 1989, prior to the move to MSF, WMATA employees subject to the relocation were taken on tours of the new facility in order to become familiar with it. Plaintiff was taken by Mr. Long for a tour by herself. While driving to the facility, Mr. Long allegedly fondled plaintiff and, once at the warehouse, forced her to have sexual intercourse with him, stopping only because Mr. Long noticed another employee in the building. Mr. Long allegedly again told plaintiff that if she told anyone about what had happened, he would fire her and see to it that her husband was fired as well.

In October 1989, Ms. Gary was involved in a serious car accident which resulted in her absence from work for several months. When she returned to work in late January 1990, she alleges that Mr. Long resumed verbal harassment of her, which continued until she took leave from work on or about February 22, 1990.

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2. There is some conflict about exactly when the alleged harassment began. In her deposition, plaintiff said it began approximately one year prior to the move to Metro Supply Facility. In the complaint plaintiff filed with the EEOC, she stated that the period of harassment extended from April 1989 to February 14, 1990. This factual discrepancy is immaterial to the Court's ruling on defendants' summary judgment motions.

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According to Ms. Gary's deposition, she did not notify anybody of her allegations of sexual harassment until February 1990. On February 14, 1990, Ms. Gary placed an anonymous phone call during a work break to Ms. Anna Martin, special assistant to WMATA's General Manager. Ms. Gary told Ms. Martin that she was afraid to tell anybody that she was being harassed on the job. During this phone call Ms. Gary identified the department and division in which she worked, but not her name. Plaintiff testified during her deposition that Ms. Martin told her not to be afraid and that they could help her; Ms. Gary told Ms. Martin that she would call her back.

Ms. Gary also testified that around mid-February she told a supervisor, who himself reported to Mr. Long, and a few other employees that she was being harassed, but that she did not say that the harassment was sexual in nature. Ms. Gary took leave from work in mid-February 1990, shortly after her February 14 phone call to Ms. Martin.

By letter dated February 28, 1990, plaintiff's attorney wrote to WMATA's General Manager on plaintiff's behalf, informing WMATA of Ms. Gary's allegations and requesting that WMATA investigate them. Upon receipt of this letter, WMATA initiated an investigation, which entailed interviews with Ms. Gary, Mr. Long and several other WMATA employees. WMATA's investigation did not corroborate the charges made by the plaintiff against Mr. Long.

Plaintiff has not raised any objections to WMATA's investigation or questioned WMATA's good faith in conducting it. She did request to be reassigned to a new work location, and WMATA promptly honored her request. In mid-May 1990, Ms. Gary returned to work at a WMATA facility in Bladensburg. She has since transferred to other locations and remains in WMATA's

employ. At no time since the February 28, 1990 letter has Ms. Gary worked with Mr. Long. Plaintiff filed a complaint with the Equal Employment Opportunity Commission in May 1990.

WMATA has never received any sexual harassment complaints about Mr. Long other than those raised by Ms. Gary. WMATA also has submitted evidence that it has developed and maintains an active program to prevent sexual harassment. WMATA has an Equal Employment Opportunity Counseling program and a discrimination complaint system which employees who feel they are the victims of sexual harassment can utilize. WMATA's Civil Rights Manual directs any employee who feels he or she has been discriminated against because of race, color, religion, sex, national origin, age, or handicap to contact an EEO Counselor to assist in resolving the complaint. If this effort fails, a formal complaint may then be filed, in which case WMATA assigns an EEO investigator to investigate the complaint. The employee complainant has the right to be represented by any person of his or her choosing, at any stage in this process. WMATA contends that this program has been well publicized, and pictures of the EEO Counselors with their phone numbers have been posted on workplace bulletin boards.[3]

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3. In August 1981, and again in November 1984, WMATA's General Manager issued Staff Notices to all employees, explaining WMATA's policy against sexual harassment and alerting employees of the availability of the Counseling program and discrimination complaint system. In 1983 and 1985, WMATA sponsored an EEO awareness conference, which included a workshop on sexual harassment. Around 1985, WMATA presented various programs on Title VII for approximately 600 supervisors; at several of these programs the Contract Compliance Officer in WMATA's Office of Civil rights discussed sexual harassment.

In addition to the EEO Counseling and grievance procedure, plaintiff could have raised her complaint through the grievance procedure established pursuant to the collective bargaining agreement between WMATA and her union.

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Plaintiff has not refuted WMATA's representations concerning its policy against sexual harassment, and the Court accepts them as true.

II. *Analysis of Title VII Claim.*

Courts recognize two theories under which a plaintiff can obtain relief for sexual harassment in violation of Title VII: *quid pro quo* harassment and harassment which creates a sexually hostile work environment. *Quid pro quo* sexual harassment occurs when an employer alters, or threatens to alter, an employee's job conditions as a result of the employee's refusal to submit to sexual demands. An employee makes out a hostile environment claim when harassing conduct at work is sufficiently pervasive so as to create an abusive working environment. *See Meritor Sav. Bank, FSB v. Vinson,* 106 S.Ct. 2399 (1986). In the instant case, Ms. Gary asserts a claim under the hostile environment theory.

A. *Defendant Long's Motion for Summary Judgment.*

Mr. Long seeks partial summary judgment on plaintiff's Title VII claim against him, arguing that plaintiff failed to file her complaint as to some of her allegations with EEOC in a timely fashion.

Federal regulations require that discrimination complaints be filed with the EEOC within 180 days from the date of the alleged violation. 29 C.F.R. §1601.13(a). Under the continuous tortious conduct theory, the cause of action of a plaintiff who has suffered ongoing harassment does not accrue until the tortious conduct has ceased. Thus, a plaintiff can raise allegations of conduct which occurred outside of the 180 day filing period, if

such conduct is part of a continuing pattern of harassment which ceased within 180 days of the filing of the complaint. *See Jensen v. Frank*, 912 F.2d 517 (1st Cir. 1990); *Rochon v. FBI*, 691 F.Supp. 1548 (D.D.C. 1988).

Defendant Long concedes that there are material issues of fact as to whether Mr. Long engaged in acts of verbal sexual harassment in early 1990, which is within 180 days of Ms. Gary's filing her complaint. Therefore, Long concedes, acts of verbal harassment which occurred prior to the charge-filing period are actionable under Title VII as part of a continuing pattern of tortious conduct.

Mr. Long argues, however, that the alleged sexual assault is a distinct charge, which cannot be viewed as part of a continuing pattern of verbal harassment. Long argues that the assault has "the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights," *Berry v. Board of Sup'rs of L.S.U.*, 715 F.2d 971, 981 (5th 1983). Since plaintiff alleges only a single incident of sexual assault, Long asserts that the 180 day charge-filing period for it should begin to run from the date on which the assault allegedly occurred. As plaintiff filed her complaint with the EEOC in May 1990, more than 180 days after the assault allegedly occurred, Long argues that plaintiff's Title VII claim should be dismissed as to it.

The Court does not agree. Long's argument would substantially undermine the hostile environment theory approved in *Meritor Sav. Bank, FSB v. Vinson*. To prevail under this theory, plaintiff must prove that Mr. Long created a hostile environment. The fact that he did not physically threaten her on more than one occasion does not preclude the assault from being a part of an overall pattern of offensive behavior which created a hostile

environment in violation of Title VII. Accordingly, defendant Long's motion for summary judgment is denied.

B. *WMATA's Liability.*

Taking plaintiff's allegations as true, the critical issue involved in WMATA's motion is whether WMATA can be held liable. The Court finds that, in the circumstances of this case, WMATA cannot, as a matter of law, be held liable for Mr. Long's alleged conduct.

Vinson, which provides the Supreme Court's only guidance on the issue of employer liability in Title VII suits, held that employers are not strictly liable for the acts of their supervisors in all circumstances. However, the Court also concluded that "absence of notice . . . does not necessarily insulate [an] employer from liability" and declined to issue a definitive rule on this issue, or to elaborate on what the determinative circumstances governing such liability might be. Rather, the *Vinson* Court directed the lower courts to look to agency principles for guidance. *Vinson,* 106 S.Ct. at 2408.

This Court agrees with a growing line of cases decided since *Vinson* which find that different standards of employer liability are appropriate in *quid pro quo* and hostile work environment claims. As the Eleventh Circuit stated:

> . . . In a *quid pro quo* case, the corporate defendant is strictly liable for the supervisor's harassment . . . In such a case, the supervisor relies upon his apparent or actual authority to extort sexual consideration from an employee. Therein lies the *quid pro quo.* In

> that case, the supervisor uses the means furnished to him by the employer to accomplish the prohibited purpose. He acts within the scope of his actual or apparent authority to "hire, fire, discipline or promote."
>
> Strict liability is illogical in a pure hostile environment setting . . . [in which] the supervisor acts outside the scope of actual or apparent authority to hire, fire, discipline, or promote. Corporate liability, therefore, exists only through *respondeat superior* . . . where the corporation knew or should have known of the harassment and failed to take prompt remedial action[.]

Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989) (citations omitted).

At least one court has found that the reasonableness of a plaintiff's failure to notify the employer of harassment is relevant to the issue of employer liability and presents a question for the jury. *See Hopkins v. Shoe Show of Virginia*, 678 F.Supp. 1241 (S.D.W.Va. 1988). While the Court agrees that the reasonableness of plaintiff's failure to notify the employer is a relevant consideration, the issue of reasonableness is not a strictly subjective issue. Both the perspective of the plaintiff as well as the conduct of the employer must be considered. Where, as here, there is nothing in the record to suggest that the employer, through its policy on sexual harassment or otherwise, has done anything which would contribute to an employee's reluctance to notify the employer of his or her claims, however real the

employee's fear of reporting the claim to the employer may be, the employer should not be held liable.

The Court is mindful of the dangers of not holding employers responsible for the conduct of their employees and supervisors. Employers establish the code of acceptable versus unacceptable conduct in the workplace and must take affirmative measures to insure that employees adhere to that code. However, as the Supreme Court has made clear, an employer cannot be held responsible in all cases when its policy against sexual harassment is violated. An employer is not liable for the hostile environment created by a supervisor when the employer (1) has done nothing to indicate that it sanctions the type of conduct for which the offending supervisor is accused, (2) has a strong policy against sexual harassment and has made available to employees an avenue of complaint which steers clear of the offending supervisor, and (3) takes prompt remedial measures as soon as it is alerted of the situation.[4]

In this case, plaintiff has made no allegations that WMATA either knew or should have known that she was being harassed by Mr. Long. She has not made any allegations that sexual harassment of other employees was tolerated by WMATA or that WMATA did anything to suggest that it would not take her claims seriously or protect her against reprisals. To the contrary, the record is full of uncontested indications that WMATA has a strong policy against sexual harassment, including a grievance procedure through which employees can raise complaints, and that it takes such complaints seriously. As soon as WMATA was

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4. The Court's holding may not apply where the supervisor charged with harassment holds a high-ranking position with the employer. For example, a company's liability for harassment on the part its president may well be subject to a different standard, which the Court need not, and does not, address in this opinion.

alerted to Ms. Gary's allegations, it acted quickly to investigate them. Despite the investigator's finding that her charges were not substantiated, WMATA took measures to insure that plaintiff would not have to continue to work under or around Mr. Long.[5]

Accordingly, in the circumstances of this case, the Court finds that WMATA cannot be held liable under Title VII for the alleged acts of defendant Long.

An appropriate order accompanies this Opinion.

Date: 12/1/92

s/ Stanley Sporkin
Stanley Sporkin
United States District Court

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5. As noted above, plaintiff has not questioned the rigor of WMATA's investigation or the good faith under which it was conducted. Nor has plaintiff challenged as inappropriate the remedial measures WMATA took following the investigation — namely to transfer Ms. Gary to a new work site rather than to transfer or take disciplinary action against Mr. Long.

Appendix D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-3076
(Stanley Sporkin)

CORAMAE ELLA GARY,

Plaintiff,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

AND

EDWARD LONG,

Defendants.

MEMORANDUM OPINION AND ORDER

Upon consideration of defendants' Motions for Summary Judgment in the above-captioned proceedings and Plaintiff's Oppositions thereto, and after hearing oral argument from all parties, for the reasons stated in the foregoing opinion, it is hereby

ORDERED that counts II and VI are dismissed; it is

FURTHER ORDERED that defendant WMATA's motion as to count I is granted and count I is dismissed as to defendant WMATA; and it is

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FURTHER ORDERED that defendant Long's motion as to count I is denied and count I is not dismissed as to defendant Long.

Date: 12/1/92

s/ Stanley Sporkin
Stanley Sporkin
United States District Court